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No. 90-891

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IN THE

Supreme Court of the United States

October Term, 1990

CHARLES WHITE, *et al.*,

Petitioners,

v.

RAYMOND S. DANIEL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals properly invoked the doctrine of laches to bar a challenge to a redistricting plan filed *after* all of the elections scheduled under that plan have already been conducted, where a new districting plan using 1990 census data is required by state law to be implemented *before* the next scheduled election and where no interim election was ordered.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the members of the Board of Supervisors, the members of the Electoral Board, and the Registrar of Brunswick County, Virginia respectfully request that the Petition for a Writ of Certiorari be denied.

MISSTATEMENTS IN PETITIONERS' "QUESTIONS PRESENTED FOR REVIEW"

The portion of the Petition entitled "Questions Presented for Review" contains three egregious misstatements of fact.

First, the first question posed by petitioners states that the Court of Appeals held that the 1971 plan "was immune from challenge under the doctrine of laches because the plaintiffs did not file their complaint at the time the plan was first enacted...." This is an incorrect statement of the court's holding. The court did not rule that the challenge had to have been filed at the time the plan was first enacted. Indeed, the court's ruling did not preclude a challenge as long as any additional elections were scheduled under the plan. Rather, the court of appeals merely ruled that a challenge to the plan filed after *all* of the elections to be conducted under it had already been held was barred by the doctrine of laches.

Second, the second question states that "the affirmative defense of laches was rejected as untimely by the district court." This statement is incorrect both factually and legally. The county defendants asserted the affirmative defense of laches in their Answer, which was timely filed and was never stricken. The defendants also asked the court to dismiss the case on the basis of laches at the conclusion of plaintiffs' evidence at trial; this motion was denied from the bench without explanation. The defendants again raised laches in their post-trial brief as a basis for dismissal; the district court's final order and memorandum opinion did not address the laches argument.

Third, the second question states there is no trial court record of the disruption or burden imposed on the locality if it were forced to implement the district judge's order. This is incorrect. The record before the court of appeals contains ample evidence of prejudice to the county from the district court's order.

The question petitioners seek to have reviewed is more accurately and appropriately stated as follows:

> Whether the court of appeals properly invoked the doctrine of laches to bar a challenge to a redistricting plan filed *after* all of the elections scheduled under that plan have already been conducted, where a new districting plan using 1990 census data is required by state law to be implemented *before* the next scheduled election and where no interim election was ordered.

STATEMENT OF THE CASE

Brunswick County, located in southeastern Virginia, is governed by a five-member Board of Supervisors. Each member is elected from a single-member district by plurality vote from the voters of that district for a four-year term. Terms of office begin January 1 of the year following the November general election. Terms are not staggered.

During the last two decades elections for supervisors have been conducted in the November general elections in 1971, 1975, 1979, 1983, and 1987. The next election for supervisors will be conducted in the November general election in 1991.

Under Virginia law, Brunswick and other Virginia counties are required to reapportion supervisor election districts every ten years following the decennial census. Brunswick County reapportioned in 1971 and 1981, as required by the state constitution and by statute. Va. Const. art. VII, § 5; Va. Code Ann. § 15.1-37.5. The next reapportionment required by law will occur in 1991, using the 1990 decennial census results published by the United States Bureau of the Census. The 1991 reapportionment process will be completed before the next supervisory elections in November, 1991. State law requires that the November, 1991 general election be conducted using the newly reapportioned district boundaries. Va. Code Ann. § 24.1-17.2(B).

Brunswick County's present election district boundaries were adopted in 1971. The county's population totaled 16,172, of whom approximately 58% were black. Two of the five districts were composed of approximately 50% black population, two districts contained more than 65% black population, and the remaining district was composed of approximately 55% black population. Two of the five supervisors elected in 1975 were black. Those two supervisors have served continuously since then, one of them as chairman of the Board. Two other black candidates were narrowly defeated in successive elections in the 55 percent black district: one black candidate lost to an incumbent by 92 votes in 1975; another black candidate lost by 47 votes in 1979. No black candidate has sought the seat since 1979.

In 1981, when the 1980 census figures were released, the total population had declined to 15,632 and the county's racial composition had become approximately 57% black. The Board initially believed that some changes in the election

district boundary lines would be required because of changes in the population distribution that resulted in a total population deviation of greater than 10%. The county manager developed a proposed plan and published it in the local newspapers. The Board then conducted public hearings on the proposed plan. A group of black citizens, represented by a lawyer from Central Virginia Legal Aid, objected to the county manager's proposal and submitted an alternative plan. Before any new plan was implemented, however, the county discovered several errors in the census reports. When the errors were corrected, the total population deviation among the existing districts was less than ten percent, and the Board determined that no change in the district lines was required. After a public hearing on the proposal to retain the existing lines, at which no one expressed opposition, the Board unanimously passed an ordinance re-adopting the existing district and precinct boundaries.

Black citizens of Brunswick County, including officers and members of the plaintiff-petitioner NAACP, were aware of and participated in the redistricting process in both 1971 and 1981. The county published its proposed plans in local newspapers, held public hearings, and provided opportunity for public comment. The plans ultimately adopted were not opposed by any individual or group. With regard to the 1981 plan, the Board did not receive any adverse comment from any citizen, black or white, from the time it was proposed until this lawsuit was filed in September, 1988.

The racial composition of the districts as re-adopted in 1981 was approximately the same as in 1971. Black population percentages were 50.7, 64.4, 54.6, 68.6, and 49.1. The two black supervisors first elected in 1975 were re-elected in 1983 and 1987 in Districts 2 and 4. In District 3, where the black population was 54.6% of the total, the

black voting age population was 51.1%, the registered voters were 52.3% black, and black turnout rates on election days equaled or exceeded those of whites. No black candidate sought election to this seat in the 1980's.

In this lawsuit, petitioners asked the district court to declare the 1981 plan unlawful, to impose a new plan that contained three "supermajority" black districts of at least 65% black, and to order an interim election. The district judge declined to order an interim election, but he did order the county to implement a plan designed by the American Civil Liberties Union that had three supermajority black districts. The district judge ordered the county to implement the ACLU plan by December 31, 1990. Implementation of the court-imposed plan would have required Brunswick County to redraw all five supervisor election districts and to devise new precinct boundaries for at least ten of the eleven precincts in the county. The county was not offered any opportunity, before or after the court's ruling, to submit its own proposal.

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Does Not Undermine the Voting Rights Act and Does Not Disfranchise Minority Voters

The list of horribles asserted by petitioners to flow from the Fourth Circuit's decision has no foundation in fact or law.

First, the court's decision to apply the doctrine of laches is explicitly limited to the facts of this case. It does not purport to bar Voting Rights Act challenges in different factual circumstances. It certainly does not preclude voting rights suits where there are additional elections scheduled to be conducted under the challenged plan, nor does it preclude future challenges to new or re-adopted plans to govern elections in the coming decade. On the contrary, the decision to apply laches is specifically premised on the facts here -- that all elections under the 1981 plan had already been conducted, that the county is required by law to reapportion in the spring of 1991 using 1990 census data, and that the next scheduled election will be conducted using the newly adopted districting plan.

In their brief, petitioners make the puzzling assertion that the court of appeals decision would bar a future challenge to Brunswick County's election districts if the Board of Supervisors decides in the spring of 1991 not to alter any of the district boundaries. This broad reading is not warranted by the language of the opinion. In fact, the court states that the county is required by law to conduct the reapportionment process in 1991 and that plaintiffs may assert a new justiciable cause of action if they believe the Board's reapportionment decision violates the Voting Rights Act. Unlike the 1981 reapportionment decision at issue here, where all of the elections are already over, the 1991 reapportionment decision, whatever it is, will govern at least three supervisor elections -- 1991, 1995, and 1999. The future and continuing effect of the 1991 reapportionment decision distinguishes it from the 1981 plan, which in effect expires by operation of law before the 1991 elections.

Petitioners' contention that the Fourth Circuit's decision will "disfranchise" minority voters is baseless.

Brunswick County's minority voters retain all of the voting rights to which they are entitled under the Constitution and the Voting Rights Act. Because the district court declined to oust the existing Board of Supervisors and declined to order an interim election, the scheduled election date has not changed, and no election will be held before the new system is in place. The only difference flowing from the court of appeals decision is that the county will only have to conduct the reapportionment process once before the next scheduled elections, rather than twice, as the district court order would have required.

In an effort to rebut the Fourth Circuit's finding of prejudice to the county, petitioners assert in their brief that no further action would have been required of the county if the district court's order had been left intact. This is incorrect.

The so-called "Voting Plan A" ordered to be implemented by the district court is nothing more than a colored map. While it contains election district lines, it does not contain new precinct boundaries. To implement "Voting Plan A," Brunswick election officials would first have to prepare a narrative legal description of the new lines, all of which are different from the existing boundaries. They would then have to carve out at least ten, and perhaps eleven, new precincts because the ACLU plan would have required massive precinct boundary changes in all five election districts. Each new precinct would then have to be described and a polling place selected in conformity with state law requirements governing size and accessibility. *See, e.g.*, Va. Code Ann. §§ 24.1-37 to -40.

Next, election officials would have to mail notices to every single registered voter affected by the plan changes,

which under the ACLU plan would have been nearly all of Brunswick's more than 8,000 registered voters. Va. Code Ann. § 24.1-39. Some voters in rural areas near precinct borders would have to be individually re-registered. Maps and legal descriptions of the new plan would have to be published in newspapers of general circulation in the county and the appropriate ordinances adopted after required public hearings. Any part of the plan not specifically imposed by the district court order would presumably have to be submitted to the Justice Department for preclearance under Section 5 of the Voting Rights Act. The Electoral Board would have to revise most election official appointments, since the new precinct lines would alter the precincts in which the current officials reside and the distribution of officials according to party affiliation. *See* Va. Code Ann. § 24.1-32. *See generally* Division of Legislative Services, *Guide to Local Redistricting for 1991* (1990).

This description of the steps required to implement the district court's order is by no means exhaustive, but it does illustrate the substantial amount of work the county would have had to complete by December 31, 1990 if the district court's order had not been vacated.

It is true, of course, that many of these same steps will have to be taken if the Board's 1991 reapportionment decision results in new election district boundaries. The point is that they will only have to be performed once, not twice, under the court of appeals ruling. Not only will this eliminate a vast amount of pointless work by election officials, but it will also reduce the voter confusion that would have resulted if voters had been notified twice within a six month period of new district, precinct, and polling place assignments.

The court of appeals decision is superior to the district court's decision, not only for pragmatic reasons, but also on public policy grounds. This Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). In this case, however, the temporary plan, "Voting Plan A," was ordered into effect by the district judge without affording Brunswick County any opportunity to propose its own plan, in contravention of this Court's directives. *Id.* at 540 (federal courts instructed "to afford a reasonable opportunity for the legislature to meet [legal] requirements by adopting a substitute measure").[1/] It was one of two plans created by an ACLU contractor based on 1980 census figures. The district judge did not hear any testimony or seek any statement from either party about which plan would be preferable and why, nor did he consider any

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[1/] Petitioners state in their brief that "[t]he defendants neither submitted a remedial plan nor requested the opportunity to do so." Petition at 8. The truth is that the district judge summarily imposed the court-ordered plan simultaneously with his decision on the merits without inviting or permitting the county, at any time before or after his ruling, to submit its own plan or to comment on the ACLU proposals. The district court did not, at any time prior to rendering its final decision, make a ruling or otherwise advise the county that it would impose a plan of its own choosing simultaneously with its ruling on the merits. The Board of Supervisors cannot be faulted for not submitting a proposed plan before or during the trial. The Board certainly could not be expected to anticipate that the district court would ignore established precedent or to anticipate the scope of relief that would be ordered by the court. Based on plaintiffs' projections, a court-ordered remedy could have fallen anywhere within a 16 percent population spread. It is certainly not reasonable to expect Brunswick County to have devised, in advance of the district court's ruling, an entire series of possible voting plans with varying black percentages in an effort to guess what the district court might ultimately order as a remedy.

alternative to the two ACLU maps.[2/] The court-imposed plan was never submitted for public review or discussion, and there is no evidence that the court-imposed plan is the one preferred by Brunswick County's black citizenry as a group.

In contrast, the Fourth Circuit's decision will permit the orderly development of a new districting plan, using current census data, with ample opportunity for the public to comment on the Board's proposed plan and to submit alternative plans. During this process, the Board of Supervisors will be able to consider more than just bare bones racial population distributions. It will also be able to consider the size and shape of the proposed districts, the degree of change they would require from established voting patterns, the effect of new lines on municipal boundaries and unincorporated but nevertheless cohesive communities, the impact on candidates, including incumbents, and the practical consequences on voter turnout and polling place accessibility of proposed boundary lines such as interstate highways, rivers, and railroad tracks. These considerations, vitally important to the voters and election officials of the county, are best left to be worked out by the citizenry and their elected officials, not by a district judge acting without any local input.

Under the court of appeals ruling, there is every reason to hope and expect that the 1991 districting plan will be developed in conformity with the Voting Rights Act, as amended and currently interpreted by the courts, and that it

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[2/] These plans were introduced to satisfy the first prong of the three-part threshold test announced in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that the minority population is sufficiently large and geographically compact to permit creation of the requested districting remedy.

can be implemented without objection or litigation.[3/] If, however, petitioners or any other citizens of the county object to the new plan, they have available the full array of avenues of relief under federal and state law, including filing a complaint with the Justice Department and filing a Section 2 complaint in federal court.

II. There Is No Conflict Between the Circuits on the Application of Laches to Cases Under Section 2 of the Voting Rights Act

Petitioners' contention that there is a conflict among the circuits on the application of laches to Section 2 cases is incorrect. It is axiomatic that the application of laches depends upon the facts of each case. *White v. Daniel*, App. 10, citing *National Wildlife Federation v. Burford*, 835 F.2d 305, 318 (D.C. Cir. 1987) ("Needless to say, whether laches bars an action depends upon the particular circumstances of the case.")

In this case, the court of appeals applied the bar because there were no elections remaining to be conducted under the 1981 plan, no interim election was ordered by the

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[3/] Two points are important to remember. First, petitioners conceded at trial that there was no evidence of racially discriminatory intent in the Board's adoption and maintenance of the current plan. Second, the district court's finding of discriminatory effect was not affirmed by the court of appeals. The county appealed the Section 2 finding, but the Fourth Circuit did not reach the merits because its laches ruling was dispositive.

district court, and a new reapportionment decision would be in effect for the next scheduled elections.

Petitioners claim that the Ninth Circuit's decision in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir.), *petition for cert. filed*, 59 U.S.L.W. 3420 (U.S. Dec. 10, 1990) (No. 90-849), is in conflict with the Fourth Circuit's holding. In *Garza*, however, at the time suit was filed and the decision rendered, there was one more election remaining to be conducted under the challenged plan in which two of the five supervisor seats would be filled. Citing the "ongoing nature" of the plan, the court ruled that "plaintiffs present claim ought not be barred by laches." The court *did not* hold that the doctrine of laches should never be applicable to Section 2 cases. Instead, its decision not to bar the claim was based on the specific facts of the case.[4/]

The same principle is true for all of the other cases cited by petitioners as rejecting laches in a Section 2 context. In every case cited, there was either at least one more election scheduled under the challenged plan or the election practice at issue would continue regardless of reapportionment. In *Smith v. Clinton*, 687 F. Supp. 1310, 1313 (E.D. Ark. 1988), *Jeffers v. Clinton*, 730 F. Supp. 196, 203 (E.D. Ark. 1989), *Knox v. Milwaukee County Board of Election Comm'rs*, 607 F. Supp. 1112, 1116-18 (E.D. Wis. 1985), and *McCray v. Mississippi State Board of Election Comm'rs*, No. DC84-131-LS (N.D. Miss. Feb. 12, 1985), at least one more election was scheduled to be held under the challenged plan. In *Jackson v. Allain*, No. GC84-42-LS-O (N.D. Miss. Feb. 12, 1985) and *Brown v.*

[4/] An additional distinction is that the challenged plan in *Garza* was found to be intentionally discriminatory. Here, there was no evidence of discriminatory intent.

Chattanooga Board of Comm'rs, No. Civ-1-87-388 (E.D. Tenn., April 10, 1989), the challenged practices were completely unrelated to redistricting and would have continued in effect indefinitely. The practice challenged in *Jackson* was a majority vote/runoff requirement which had been continuously in effect since 1902 and would have remained in effect. In *Brown*, the challenged practices were an at large election system and a property qualification rule for voters, both of which would be unaffected by the decennial census and which would have remained in effect absent litigation.

There is no conflict among the circuits. *Garza* is based on a different set of facts, not a different legal holding. None of the other cases cited by petitioners deals with a situation like Brunswick County's, where the challenged plan is expiring by operation of law and a new plan will be in effect in time for the next scheduled election.

CONCLUSION

Laches is not a novel concept, nor is its application in voting rights cases rare. *See, e.g., Simkins v. Gressette*, 631 F.2d 287 (4th Cir. 1980); *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970); *MacGovern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986). Courts must simply exercise care in invoking it, as the Fourth Circuit did, based upon the particular facts of the case. The Fourth Circuit's decision is nothing more than the sensible application of a time-honored and well-established legal doctrine: "[P]rinciples of equity require a federal court to stay its hand when judicial relief makes no sense." App. 16.

Respectfully submitted,

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